ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION III

CA 05-1356

DECEMBER 6, 2006

BRENDA JARVIS

APPELLANT

V.

SOUTHWESTERN LIFE INSURANCE COMPANY, DAVID P. HENRY, and JOHN P. CORN

APPELLEES

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CV 02-10972]

HONORABLE TIMOTHY FOX, JUDGE

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART ON DIRECT APPEAL; AFFIRMED IN PART AND REVERSED AND REMANDED ON CROSS-APPEAL

This appeal is the result of a dispute between an attorney and his former client over a contingency fee. Although we affirm the trial judge's finding that the attorney breached the parties' agreement, we reverse and remand as to the relief ordered and as to the amount of attorney's fees awarded to the client.

Appellant Brenda Jarvis employed appellee David Henry to represent her in her divorce from John Allen and, later, in a Pulaski County Chancery Court action concerning the ownership of some insurance policies on Allen's life. In the December 30, 1997, attorney-client agreement, as amended on March 5, 1998, appellant agreed to pay Henry a contingency fee of $60,000 from the money she received from a policy on Allen's life with appellee Southwestern Life Insurance Company. Appellant gave Henry an assignment of an

interest in the Southwestern policy on March 5, 1998. Henry agreed to make future premium payments on that policy in an amount equal to his interest in the policy (thirty percent). On October 7, 1998, Henry assigned his rights to thirty percent of the proceeds of the insurance policy to appellee John Corn.

The chancellor in the *Allen v. Jarvis* case granted appellant's motion to dismiss on December 23, 1997, and Allen appealed to this court. On December 23, 1998, we reversed and remanded. Allen's attorney sent a letter to Henry on December 30, 1998, in which he noted that we had reversed and remanded the *Allen v. Jarvis* case and that a hearing had been scheduled before the chancellor on March 11, 1999. Henry took no further action in that case, although he remained listed as an attorney of record for appellant. Stephen Engstrom entered his appearance as appellant's counsel, "along with David P. Henry," in appellant's lawsuit against Allen on March 4, 1999, and filed an "Amended Response to Complaint and Counterclaim" on March 17, 1999.

On November 18, 1999, attorney Michael Ptak, acting on appellant's behalf, sent a letter to Henry, informing him that he had been terminated by appellant as her attorney and that his representation of her in connection with the chancery case had long since ended. He stated that, because Henry had materially breached the contingency agreement by failing to make premium payments on the Southwestern policy, appellant was under no further obligation to Henry. He also said that Henry's representation of appellant had been inadequate:

> For instance, following the Court of Appeals' reversal of the trial court's decision to grant the Motion to Dismiss you filed on behalf of Ms Jarvis, you failed to file an Answer to John Allen's Complaint within the time limit imposed by Rule 12(a) of the Arkansas Rules of Civil Procedure. Although your failure to timely file an Answer did not result in a default being declared against Ms. Jarvis (thanks to the actions of Steve Engstrom), you nevertheless breached the Attorney Client Agreement by failing to adequately represent Ms. Jarvis. This additional material breach of the Attorney Client Agreement also discharged the Attorney Client Agreement and released Ms. Jarvis from any obligations imposed upon her in the Agreement. . . .
>
> Based upon your material breach of the Attorney Client Agreement which resulted in the discharge of that Agreement, we hereby demand that you release and disclaim any rights you previously may have had under the Assignment of Life Insurance Policy as Collateral entered into by and between you and Ms. Jarvis on March 5, 1998. To facilitate this, you will find enclosed a Release of Assignment of Policy relating to Southwestern Life Insurance Company Policy Number 1000000283. We hereby demand that you execute and return the Release and Assignment of Policy to our office within seven (7) days of the date of this letter . If you fail to do so, we will be forced to resort to litigation to resolve this matter.

In response, Henry wrote Ptak that he had attempted to "contribute" to appellant's premium payments but appellant had refused his contributions. He stated that he had been unsuccessful in his attempts to discuss the matter with appellant and added that he was prepared to make immediate payment of his portion of the premiums as soon as he received documentation of the amount due.

In October 2002, appellant filed this action against Southwestern, Henry, and Corn. She alleged breach of contract against Southwestern and sought cancellation of the contingency agreement and assignment to Henry and the assignment to Corn because of Henry's failure to pay his pro rata share of the insurance premiums. She also alleged that Henry had materially breached their contract by failing to adequately represent her in the

Allen v. Jarvis litigation and by failing to make the insurance premium payments. She asked that the court declare the contingency agreement and assignments void and that Henry and, thus, Corn had no rights to the life insurance proceeds. Alternatively, appellant alleged that, as a result of Henry's material breach of contract, she had sustained damages in excess of $60,000. She also sought attorney's fees pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1999).

In October 2004, the circuit judge granted summary judgment to Southwestern, directed it to pay the disputed policy proceeds into the registry of the court, and dismissed all claims against it. Appellant filed a notice of appeal and lodged the record with the supreme court clerk. On April 13, 2005, we granted Southwestern's motion to dismiss the appeal for lack of a final, appealable order.

In the judgment filed on May 17, 2005, the circuit court found that Henry maintained his interest in the proceeds being held under the contingency agreement, but was in breach of contract with appellant concerning the payment of insurance premiums in the amount of $9018.45; that Corn, as Henry's assignee, had no rights in the insurance proceeds that were greater than Henry's; and that appellant, as the prevailing party, was entitled to an award of attorney's fees of $7500 and costs of $140. The court directed the clerk to disburse the funds as set forth above and to issue a check to Corn for the balance of the money. Appellant filed a notice of appeal, and Henry and Corn filed a notice of cross-appeal.

We will reverse the circuit court's findings of fact if they are clearly erroneous or clearly against the preponderance of the evidence. *Mathews v. Mathews*, __ Ark. App. __, __ S.W.3d __ (Sept. 21, 2006). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id*. We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Id*. A trial court's conclusions of law, however, are given no deference on appeal. *Id*.

In her first point on appeal, appellant argues that Henry's material breach in failing to pay thirty percent of the insurance premiums discharged her contractual obligation to pay the contingency fee. Henry contends that his nonpayment of the premiums cannot be considered a breach of contract, much less a material breach. He testified that, until the week before trial, appellant would not cooperate with him or provide him with any information about the amount he was to pay for the premiums. At trial, he offered to pay the amount shown in the documents appellant finally furnished him. On the other hand, appellant testified that Henry had been given copies of every premium payment she had made. Also, Henry admitted that he was aware of his obligation to pay the premiums; that he had received eight or nine lapse notices from Southwestern; and that he had not paid Southwestern any money. In finding that Henry had breached the agreement by failing to pay his portion of the premiums, the trial judge apparently credited appellant's testimony over Henry's. Whether a breach of contract occurred is a question of fact, and the trial judge's

findings of fact on this issue will not be set aside unless clearly erroneous. *Worch v. Kelly*, 276 Ark. 262, 633 S.W.2d 697 (1982). We cannot say that this finding is clearly erroneous; therefore, we affirm on this issue.

The next question concerns the legal effect of Henry's breach. The legal principles relevant to contracts apply to the attorney-client fee arrangement. *See* Ark. Code Ann. § 16-22-302 (Repl. 1999). When performance of a duty under a contract is contemplated, any nonperformance of that duty is a breach. *Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996). It is an elementary rule that a person who has himself broken a contract cannot recover on it. *Taylor v. George*, 92 Ark. App. 264, __ S.W.3d __ (2005). As a general rule, the failure of one party to perform his contractual obligations releases the other party from his obligations. *Stocker v. Hall*, 269 Ark. 468, 602 S.W.2d 662 (1980); *Am. Transp. Corp. v. Exch. Capital Corp.*, 84 Ark. App. 28, 129 S.W.3d 312 (2003); *Vereen v. Hargrove*, 80 Ark. App. 385, 96 S.W.3d 762 (2003). However, a relatively minor failure of performance on the part of one party does not justify the other in seeking to escape any responsibility under the terms of the contract; for one party's obligation to perform to be discharged, the other party's breach must be material. *Id*. An influential circumstance in the determination of the materiality of a failure fully to perform a contract is the extent to which the injured party will obtain the substantial benefit that she reasonably anticipated. *Id*.

Although the trial judge did not make a finding as to whether Henry's breach of contract in failing to pay the premiums was material, we believe that it was and, thus, that

the agreement and assignments should be canceled. Appellant points out that she sought cancellation of the contingency agreement and assignments, not their enforcement. Even though appellant prevailed in persuading the trial judge that Henry breached the agreement, she did not obtain the relief she sought. We hold that she should have been awarded such relief and that the trial judge's decision to enforce the contingency agreement and assignments, upon the payment of the insurance premiums by Henry, was clear error of law. Therefore, we reverse and remand for the trial judge to enter an order canceling the agreement and assignments and directing that the balance of the insurance proceeds be paid to appellant.

Appellant also asserts that Henry materially breached their agreement by abandoning his representation of her after this court's reversal and remand of the *Allen v. Jarvis* case and by failing to provide adequate legal representation. The trial court did not, however, rule on this question. We do not address issues on which an appellant fails to obtain a ruling. *Israel v. Oskey*, 92 Ark. App. 192, __ S.W.3d __ (2005). Appellant argues in her second point that, in any event, the contingency fee was not reasonable. Again, we do not address this issue because the trial court did not rule on it.

For their cross-appeal, appellees contend that the trial court erred in awarding any attorney's fees to appellant because, having failed to obtain any of the relief she requested, she was not the prevailing party. Appellees' argument illustrates the inconsistency between describing appellant as the prevailing party and enforcing the agreement and assignments.

Arkansas Code Annotated section 16-22-308 (Repl. 1999) provides that a reasonable attorney's fee may be awarded to the prevailing party in certain civil actions, including those involving breach of contract. To be the prevailing party, the litigant must be granted some relief on the merits of her claim. *BKD, LLP v. Yates*, __ Ark. __, __ S.W.3d __ (Oct. 5, 2006). Clearly, the trial judge did not abuse his discretion in awarding attorney's fees to appellant, and we affirm his decision to do so. However, when he deemed appellant to be the prevailing party and awarded her $7500 in attorney's fees, he did not grant her the relief she requested and to which we hold that she was entitled — cancellation of the contingency agreement and assignments. In light of our holding that such relief was proper, the question of attorney's fees should be reconsidered on remand by the trial judge, who may, in his discretion, award some different amount to appellant. *See Taylor v. George*, *supra*.

Affirmed in part and reversed and remanded in part on direct appeal; reversed and remanded on cross-appeal.

PITTMAN, C.J., and GLADWIN, J., agree.